MALAYAN BANKING BHD

v.

RED BOX (M) BHD

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[COMPANIES (WINDING-UP) NO: 28-29-1998]
27 JANUARY 2000

COMPANY LAW: *Winding-up - Opposition to petition - Whether termination of banking facilities lawful - Whether amount outstanding repayable on demand - Whether there was admission and acknowledgement of debt by debtor - Whether there was full and frank disclosure of facts by debtor - Whether debtor able to pay debt - Companies Act 1965, s. 218(2)(a) - Whether creditor entitled to present petition*

The petitioner bank ('the petitioner') granted various banking facilities to the respondent up to a sum of RM9.6 million. The said banking facilities were granted to the respondent subject to there being no change in circumstances which might affect the ability of the petitioner to grant them. The respondent, however, created charges in favour of another bank ('PAMB') on all its assets for a loan of RM39.6 million. The petitioner claimed that that constituted a change of circumstances which made the petitioner lose priority over the other creditors of the respondent. As such, the petitioner terminated the banking facilities and that eventually led to the filing of the winding-up petition against the respondent. The respondent had obtained an *ex parte* order restraining the petitioner from proceeding with the said petition.

Held:

[1] The granting of the banking facilities was subject to there being no change of circumstances under which the said facilities were granted. By creating a charge over all its assets in favour of PAMB, there was a change of such circumstances. Thus, the petitioner had lawfully terminated or recalled the banking facilities granted to the respondent.

[2] The banking facilities granted to the respondent were repayable on demand and there was no tenure given for repayment of the loan. The one and a half months given by the petitioner for the repayment of the loan was reasonable in the circumstances as the syndicated credit facilities granted to the respondent by PAMB could have been utilised to repay the petitioner. Further, the respondent's letter which was dated 3 October 1997 clearly showed that the respondent was in a position to raise the money required within a short span of time.

[3] The fact that the respondent did not pay the petitioner but instead had paid many of its other creditors gave rise to an inference of *mala fide*. Further, the petitioner lost priority and became an unsecured creditor.

[4] There was a blatant failure on the part of the respondent to disclose to the court at the hearing of the *ex parte* application that it had in fact admitted and acknowledged the debt that was due to the petitioner. Thus, there was an absence of a full and frank disclosure at that *ex parte* hearing.

[5] The facts showed that the petitioner had acted *bona fide* when it filed the winding-up petition. The petitioner did not intend to put pressure on the respondent to accede to its demand.

[6] There was a complete failure on the part of the respondent to make full and frank disclosure of the facts when the court granted the *ex parte* order on 8 June 1998.

[7] The dispute as to the debts arose some two months after the winding-up petition was filed and some six months after the banking facilities were terminated. It was an exercise in procrastination when the respondent disputed the debt.

[8] The respondent's audited accounts and their projections for the year 1999 right up to the year 2002 showed that the respondent was unable to pay its debts and would continue to incur losses. Being financially weak, the respondent had failed to comply with the s. 218 notice under the Companies Act 1965 that was given by the petitioner. Inability to pay by the debtor would mean that the court was empowered with the jurisdiction to make a winding-up order.

[Application dismissed with costs to petitioner.]

Case(s) referred to:

Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339 ***(refd)***
Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 ***(refd)***
American Cyanamid case [1975] AC 396 ***(refd)***
Anglian Sales Ltd v. South Pacific Manufacturing Co Ltd [1984] 2 NZLR 249 ***(refd)***
Ash v. Hutchinson & Co. (Publishers) [1936] Ch 489 ***(refd)***
Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76 ***(refd)***
Barnard v. Wieland [1882] 30 WR 947 ***(refd)***
Bates v. Lord Hailsham of St Marylebone [1972] 3 All ER 1019 ***(refd)***
Boyce v. Gill [1891] 64 LT 824 ***(refd)***
Bryanston Finance Ltd v. De Vries (No 2), Same v. Same [1976] 1 Ch 63 ***(refd)***
Castle Fitness Consultancy Pte Ltd v. Manz [1990] 1 MLJ 141 ***(refd)***

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447 ***(refd)***
Cornhill Insurance plc v. Improvement Services Ltd [1986] 1 WLR 114 ***(refd)***
Evercrisp Snack Products (M) Sdn Bhd & Anor v. Sweeties Food Industries Sdn Bhd [1980] 2 MLJ 297 ***(refd)***
Ellis v. Allen [1914] 1 Ch 904 ***(refd)***
In re Daintrey, Ex Parte Holt [1893] 2 QB 116 ***(refd)***
Mageleine Investments Pte Ltd v. Swiss Levingston (Property Consultants) Pte Ltd [1990] 1 CLJ 385 ***(refd)***
Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95 ***(refd)***
Ng Ah Kway v. Tai Kit Enterprise Sdn Bhd [1986] 1 MLJ 252 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***
Norwich Union Life Insurance Society v. Tony Waller Ltd [1984] E G (Estates Gazette) 42 ***(refd)***
Oh Kuang Liang v. Associated Wood Ind Sdn Bhd [1995] 2 CLJ 961 ***(refd)***
Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238 ***(refd)***
Pioneer Concrete (M) Sdn Bhd v. Celini Corp Sdn Bhd [1999] 5 CLJ 145 ***(refd)***
Png Siaw Luan v. Wong Tui San [1990] 3 MLJ 340 ***(refd)***
Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 ***(refd)***
PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd [1998] 4 CLJ 437 ***(refd)***
R v. Kensington Income Tax Commissioners [1917] 1 KB 486 ***(refd)***
Re A Co [1985] BCLC 37 ***(refd)***
Re Bryant Investment Co Ltd [1974] 2 All ER 683 ***(refd)***
Re LHF Wools Ltd [1969] 3 All ER 882 ***(refd)***
Re Lympne Investments Ltd [1972] 2 All ER 385 ***(refd)***
Re Tweeds Garages Ltd [1962] 1 All ER 121 ***(refd)***
Rush & Tompkins Ltd v. Greater London Council & Anor [1988] 3 All ER 737 ***(refd)***
Rutter v. Tregent [1879] 12 ChD 758 ***(refd)***
Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd [1985] 1 MLJ 84 ***(refd)***
Smith v. Davies [1884] 28 ChD 650 ***(refd)***
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 ***(refd)***
Technistudy v. Kelland [1976] 1 WLR 1042 ***(refd)***
Wong Nget Thau & Anor v. Tay Choo Foo [1994] 4 CLJ 617 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 217(1)(b), 218(2)(a)
Evidence Act 1950, ss. 62, 64
Rules of the High Court 1980, O. 29 r. 1(2)
Specific Relief Act 1950, ss. 50, 51

Companies Act 1948 [UK], s. 222(f)
Companies Act 1993 [NZ], s. 241(2)(c)
Insolvency Act 1993 [UK], s. 124(1)

Other source(s) referred to:
Encyclopaedia of Banking Law, Butterworths issue 1996, p C68
Paget Law of Banking, 10 edn, p 183

For the petitioner - Latha D Pillay; M/s David Chong & Co
For the respondent - Goh Mey Foon; M/s Leng & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of a notice of motion in encl. 14, the respondent sought for the following orders:

(a) that Malayan Banking Berhad, the petitioner named in the petition referred to this Honourable Court on 18 March 1998, be restrained from taking any further proceedings upon the petition whether by advertising the same or otherwise;

(b) the costs of this application be costs in the cause; and

(c) such further or other relief as this Honourable Court deems fit and proper.

The relevant affidavits filed in regard to encl. 14, can readily be seen in encls. 12, 10, 19, 23, 24, 26, 28 and 30. These were the affidavits of both the petitioner and the respondent.

Facts Of The Case

The petitioner agreed by letters of offer dated 22 February 1994 and 9 January 1996 to grant various banking facilities to the respondent up to a total sum of RM9.6 million. It was one of the terms of the letters of offer that the obligation of the petitioner was simply to make available to the respondent the banking facilities subject to there being no change in circumstances which may affect the ability of the petitioner to grant the banking facilities.

In exh. "A" of encl. 19 at p. 25, the letters of offer contained the following clause:

3. Changes In Circumstances

The obligation of the Bank to continue to make available to the Borrower the banking facilities shall, in addition to the terms and conditions herein and there

being no default by the Borrower, be subject to there being no change in circumstances which may affect the ability of the Bank to grant the banking facilities or which may increase the cost to the Bank of doing so.

At all material times, the respondent was a public listed company on the Kuala Lumpur Stock Exchange ("KLSE") and banking facilities granted to the respondent by their financiers be it for overdrafts, working capital requirements and tradelines were all on a clean basis (see encl. 19, para. 11, at p. 4). This fact was never denied by the respondent at all.

The banking facilities extended to the respondent by the petitioner were terminated and recalled on the following salient grounds:

(a) the respondent was creating charges in favour of Perwira Affin Merchant Bank ("PAMB") on all its assets for a loan of RM39.6 million;

(b) and this constituted a change of circumstances which made the petitioner to lose priority over the other creditors of the respondent.

There was evidence to show that the respondent had agreed by letter dated 3 October 1997 to settle all the amounts outstanding. This averment can be seen in encl. 19, para. 13 at p. 4 thereof in exhibit marked "B" and this was an agreed fact which was never denied by the respondent at all. The respondent too had proceeded one step ahead and had asked for a redemption statement from the petitioner with the intention of paying the latter. The petitioner had responded and forwarded the redemption statement to the respondent. The latter agreed to pay by 31 October 1997 and this was an agreed fact which was never denied by the respondent at all. The redemption statement was exhibited as exh. 'D' of encl. 19 and it was worded as follows:

We wish to advise the redemption amount payable on or before 31.10.97 are as follows:

A/C No	Facility Type	Redemption Amount (RM)
50011-1	Overdraft	3,593,858.10
	STRC	3,200,000.00
	BA	1,423,000.00
	BG	100,000.00
	Total	8,316,858.10

1. The above redemption sum is exclusive of penalty interest on excesses or any other bank charges the bank may impose.

2. If the amount is in arrears or excess, this redemption statement is issued without prejudice to (the) Bank's right to recover the amount owing inclusive (of) interest and penalty interest at the rate of 1% per annum

or such other higher rate as shall be imposed by the bank at any time and from time to time, above the prescribed rate of interest.

3. For the Bank's guarantee facility, you are requested to return to us the original unexpired Bank Guarantee for cancellation. Should you (be) unable to return to us the original Bank Guarantee, you are required to place Fixed Deposit equivalent to the outstanding Bank Guarantee amount under Lien and execution of other documents related to Lien of the Fixed Deposit.

The respondent played possum and despite the promises, had failed to keep their word and had failed to pay the petitioner in part or at all. The petitioner was magnanimous and full of patience. The petitioner had granted the respondent many extensions of time from 19 September 1997 until 31 October 1997, but the respondent still refused and failed to pay. The petitioner had no choice but to terminate the banking facilities. Although the banking facilities had been terminated, the petitioner was still willing to give the respondent a chance. Acting *bona fide,* the petitioner gave the respondent time to pay until February 1998 but the respondent still refused to pay and in fact failed to pay. The petitioner then issued a notice under s. 218(2)(a) of the Companies Act 1965 to the respondent on 26 December 1997 and again on 24 January 1998 due to the clerical errors in the notices. The petitioner took into account the fact that the respondent was their long standing clients and granted the respondent enough time to settle the colossal debts. On 17 February 1998, the petitioner then issued a final notice requesting the respondent to pay the amount demanded and this notice was served on the respondent on 24 February 1998. It was this very notice that the petitioner relied upon in the winding-up petition that was filed. Alas, the respondent still failed to pay the petitioner. Again, the petitioner filed a winding-up petition on 18 March 1998 and served the same on the respondent on 13 April 1998. It must be emphasised that there was no dispute as to the amounts due to the petitioner from the period stretching from September 1997 to May 1998. On 8 June 1998, the respondent obtained an *ex parte* order restraining the petitioner from advertising the petition and from proceeding with the winding-up proceedings which was served on the petitioner's solicitors at 3.40pm on the same day.

By way of a curtain raiser, I must refer to the case of *Bryanston Finance Ltd v. De Vries (No 2), Same v. Same* [1976] 1 Ch 63, a decision of the Court of Appeal. That was a case where the defendant, a minority shareholder, threatened to present a petition to wind up the plaintiff's company. It seemed that the defendant held only 62 of over 7 million issued shares in the plaintiff's company and had a personal animosity against the company's chairman. The defendant was dissatisfied with the answers he received to questions which he had asked concerning loans made by the plaintiff's company to the

chairman and companies under his control. The defendant wrote two letters to the chairman seeking further information and stated that, if he received no reply, he would present a petition under s. 222(f) of the Companies Act 1948, to wind up the plaintiff's company. The plaintiff's company issued the writ in the "first action" for an injunction to restrain the defendant from petitioning to wind it up on the ground of failure to answer to questions or any ground connected therewith. The defendant respondent had filed two affidavits making allegations of fraud, misfeasance and impropriety on the part of the plaintiff's company. On 18 March 1975 the plaintiff's company was granted an injunction pending the trial of the first action according to the terms of the injunction claimed in the writ. There was an announcement that another company was to make an offer for the minority shareholders' shares in the plaintiff's company, the defendant served a notice of motion to discharge the injunction in the first action on the ground that the offer constituted a change of circumstances justifying discharge of the order and the defendant then filed two further affidavits containing allegations against the plaintiff's company. On 30 April 1975, Oliver J dismissed the notice of motion. On 1 May 1975, the defendant issued an abortive petition and on 2 May 1975, the plaintiff's company issued the writ in the "second action" for an injunction restraining the defendant from petitioning for the winding up of the plaintiff's company on any of the grounds contained in the four affidavits filed in the first action. On 6 May 1975, the Department of Trade and Industry appointed officers to investigate the plaintiff's company's affairs. The plaintiff's company issued a motion for an interim injunction in the terms of the injunction as claimed in the writ in the second action and, although contending that the matter had to be decided on the balance of convenience and the evidence showed that a petition would be an abuse of the process of the court, conceded that the defendant might in the second action succeed in establishing that some of the grounds for presenting a petition were not an abuse of the process of the court. On 15 May 1975, Oliver J granted the interim injunction. On appeal by the defendant against the court's refusal to discharge the injunction in the first action and the granting of the injunction in the second action, the Court of Appeal held that the judge had rightly decided that there were no circumstances which would justify him in discharging the injunction granted to the plaintiff's company in the first action and, accordingly, that appeal would be dismissed. The Court of Appeal allowed the appeal in the second action and said that provided the defendant could show that he was likely to recover an appreciable amount in the winding up of the plaintiff's company judged in relation to the size of his shareholding, the smallness of that holding was not of itself a bar to the presentation of a petition. The Court of Appeal too held that if the defendant proved that he had sufficient grounds for the presentation of a petition, it was immaterial that he was actuated by malice and intended to

present it because of his enmity against the chairman. Buckley LJ writing a separate judgment for the Court of Appeal said at p. 75 of the report:

> The judge, rightly in my opinion, thought that a petition could not be an abuse simply because the petitioner was actuated by malice. If a petitioner has a sufficient ground for petitioning, the fact that his motive for presenting a petition, or one of his motives, may be antagonism to some person or persons cannot, it seems to me, render that ground less sufficient. If, on the other hand, he has no sufficient ground, his petition will be an abuse, whether he be actuated by malice or not. I personally feel no doubt that the defendant, whether rightly or wrongly, is genuinely of the opinion that Mr. Smith is conducting the affairs of the plaintiff company and of the group for his own personal advantage and in a manner oppressive to the other shareholders. If the defendant were able to make this good, he would be very likely to succeed in obtaining a winding up order. The fact that his belief was coupled with, or even fed or generated by, personal animosity against Mr. Smith would not, I think, disentitle him to such an order.

At p. 78 of the report of the same judgment, Buckley LJ said:

> It has long been recognised that the jurisdiction of the court to stay an action *in limine* as an abuse of process is a jurisdiction to be exercised with great circumspection and exactly the same considerations must apply to a *quia timet* injunction to restrain commencement of proceedings. These principles are, in my opinion, just as applicable to a winding up petition as to an action. The right to petition the court for a winding up order in appropriate circumstances is a right conferred by statute. A would-be petitioner should not be restrained from exercising it except on clear and persuasive grounds. I recognise that the presentation of a petition may do great damage to a company's business and reputation, though I think that the potential damage in the present case may have been rather exaggerated. The restraint of a petition may also gravely affect the would-be petitioner and not only him but also others, whether creditors or contributories. If the presentation of the petition is prevented the commencement of the winding up will be postponed until such time as a petition is presented or a winding up resolution is passed. This is capable of far-reaching effects.
>
> We have not been invited to substitute for the injunction granted by the judge an injunction restraining advertisement without the leave of the court of any petition which the defendant may present which might, it seems to me, have been a possible via media.
>
> In his speech in the *American Cyanamid case* [1975] A.C. 396 Lord Diplock recognised that there might be special factors to be taken into consideration in the particular circumstances of individual cases. In my judgment, the fact that the second action is an action designed to prevent the commencement of proceedings *in limine* is such a special factor. In such a case the court should not, in my judgment, interfere with what would otherwise be a legitimate approach to the seat of justice unless the evidence is sufficient to establish

prima facie that the plaintiffs will succeed in establishing that the proceedings sought to be restrained would constitute an abuse of process. In the present case, in my opinion, this has not been achieved. I would consequently allow the appeal in the second action and discharge the injunction of May 15, 1975.

Stephenson LJ in the same judgment and at p. 80 echoed the same sentiments:

This is not 'an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right,' but to restrain a defendant from exercising his legal right to present a petition. So Lord Diplock's words in the American Cyanamid case which Buckley L.J. quoted do not apply to such an application as this. Their Lordships do not seem to have had this sort of injunction in mind and they cannot have overruled *Forte's* case [1964] Ch. 240 by implication. *Forte's* case still binds us to hold that unless the plaintiff company can prove that a petition is bound to fail - or perhaps that there is a suitable alternative remedy to a petition - the defendant cannot be restrained, even temporarily, from presenting it. The judge has found that it might succeed. Some of the defendant's allegations, if substantiated, could lead the Companies Court to the conclusion that it is just and equitable to wind up the plaintiff company. He did not, and could not, find that there was no evidence to substantiate them. He was prevented from giving the proper effect to that finding by mistakenly applying the *American Cyanamid* case. So he decided this case on the wrong basis. If he thought that investigation by the Department of Trade and Industry was a suitable alternative remedy I respectfully disagree.

I agree that the first appeal fails, but the second appeal must be allowed and the defendant allowed to present his petition.

Along the same lines, Sir John Pennycuick at p. 81 of the report of the same judgment said:

The decision in the *American Cyanamid* case was, as I understand it, addressed to interlocutory motions in the sense of motions seeking interim relief pending determination of the rights of the parties at the hearing of the action: cf. per Lord Diplock. He said, at p. 405: 'The grant of an interlocutory injunction is a remedy that is both temporary and discretionary.' And at p. 406:

> When an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action.

I do not think that the decision should be read as applicable to motions which, though interlocutory in form, seek relief which will finally determine the issue

in the action and more particularly motions seeking to stop proceedings in limine. I appreciate the wide words used by Lord Diplock, at p. 406:

> In my view the grant of interlocutory injunctions in actions for infringement of patents is governed by the same principles as in other actions.

But these words must be read in their context and I am sure Lord Diplock was not intending to say that the principles were applicable in a class of case not under consideration in which their application would be entirely inappropriate.

Now, although the facts in *Bryanston Finance (supra)* were poles apart from the present case yet the principles enunciated in that case can be used as guidelines in the present case. Indeed if there was sufficient ground for petitioning the winding-up of the respondent in the present case, whatever the motive may be, the petitioner in the present case was entitled to do so. At the end of the day, it would entirely be the discretion of the winding-up court to make the order.

The notice of motion in encl. 14 for an interlocutory injunction to restrain the petitioner from proceeding further with the winding-up petition in encl. 3 should be distinguished from the hearing of the petition itself. Greig J in *Anglian Sales Ltd v. South Pacific Manufacturing Co. Ltd* [1984] 2 NZLR 249 CA, aptly said at p. 254 of the report:

> There is a clear distinction between the exercise of the discretion on hearing the petition and the exercise of the inherent discretion to restrain or stay the presentation of or further proceedings on a petition.

Surely a distinction must be drawn and, in the context of the present case, that distinction can readily be appreciated for the following reasons:

(1) The court's jurisdiction and power to hear the notice of motion in encl. 14 must necessarily flow from ss. 50 and 51 of the Specific Relief Act 1950 (Revised 1974) and these sections were worded as follows:

> 50. Preventive relief how granted.
>
> Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.
>
> 51. Temporary and perpetual injunctions.
>
> (1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the court. They may be granted at any period of a suit, and are regulated by the law relating to civil procedure.

(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

This must be contrasted with the court's jurisdiction and power to hear the petition in encl. 3 in accordance with the Companies Act 1965 and the Companies (Winding-Up) Rules 1972.

(2) Consequently, the legal tests and the relevant considerations to determine encl. 14 would surely differ from those applicable in adjudicating encl. 3. By virtue of *Bryanston Finance Ltd (supra)* and *Anglian Sales Ltd (supra)*, the burden was on the respondent to establish a *prima facie* case to support the notice of motion in encl. 14. The onus on the respondent was not merely to raise a serious question to be tried as envisaged by Lord Diplock in the *American Cyanamid* [1975] AC 396 but the respondent has the added responsibility by way of a higher standard of proof to convince me in regard to the notice of motion in encl. 14 (*Bryanston Finance Ltd (supra)* and *Anglian Sales Ltd (supra)*).

In my judgment, the legal tests to determine encl. 14 must be guided by *Bryanston Finance Ltd (supra)* and *Anglian Sales Ltd (supra)* for the following reasons:

(a) If the standard of proof which is lower than a *prima facie* case is applicable to an application for an injunction to restrain a winding-up petition, then the statutory right to wind-up a company by the creditor under s. 217(1)(b) of the Companies Act 1965 would be undermined and rendered ineffective. That section is worded as follows:

217 (1) A company (whether or not it is being wound up voluntarily) may be wound up under an order of the Court on the petition of -

(b) any creditor, including a contingent or prospective creditor, of the company.

(b) The statutory right of a creditor of a company to wind up the company under our s. 217(1)(b) of the Companies Act 1965 strikes a cord with that of the United Kingdom and New Zealand. In the United Kingdom there is s. 124(1) of the Insolvency Act 1993, while in New Zealand there is s. 241(2)(c) of the Companies Act 1993 - and these sections are similar to our s. 217(1)(b) of the Companies Act 1965.

(c) To facilitate trade and commerce between "common law countries", there should be uniformity in the law of companies. Businessmen would surely welcome this idea with open arms.

I will now examine four issues in an attempt to resolve encl. 14:

(1) Whether the respondent had made full and frank disclosure of the facts of the case when applying for the *ex parte* injunction?

(2) Whether the petitioner was acting *mala fide* when filing the winding-up petition with the intention of putting pressure on the respondent to accede to the petitioner's demand?

(3) Was there a substantial dispute of the debts?

(4) Was the respondent able to pay its debts and had not failed to do so by virtue of the respondent's failure to comply with the notice under s. 218(2)(a) of the Companies Act 1965?

The First Issue: Whether The Respondent Had Made Full And Frank Disclosure Of The Facts Of The Case When Applying For The Ex Parte Injunction?

It was the stand of the respondent as reflected at para. 12 of encl. 12 at p. 4 to the effect that the respondent had no knowledge of any facts that may cause the court not to grant the *ex parte* order pending the hearing of the *inter partes* notice of motion to restrain the petitioner from advertising the petition and from proceeding further in the winding-up petition. The law governing *ex parte* applications are quite settled. Order 29 r. 1(2) of the Rules of the High Court, 1980 ("RHC") states and expressly provides that an *ex parte* application is appropriate in a situation of urgency. Megarry J in *Bates v. Lord Hailsham of St Marylebone* [1972] 3 All ER 1019, succinctly said that:

> *Ex parte* injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion.

An interim injunction obtained in haste and by way of an *ex parte* where there is no urgency can be set aside on that ground alone (*Png Siaw Luan v. Wong Tui San* [1990] 3 MLJ 340). But now it is an accepted practice that *ex parte* applications are also appropriate in situations where secrecy is essential, particularly in applications for mareva injunctions or anton piller orders (*Castle Fitness Consultancy Pte Ltd v. Manz* [1990] 1 MLJ 141 at p. 143F). Apart from the requirement that *ex parte* applications are meant for urgent cases only, it is also the rule that *ex parte* applications must be made promptly and the applicant must not have brought about the urgency of the situation by his own deliberate delay. It does not lie in the mouth of the applicant to say that the

grant of the injunction will do no harm (*Evercrisp Snack Products (M) Sdn Bhd & Anor v. Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297). The applicant must also bare all the facts before the court and nothing must be suppressed (*R v. Kensington Income Tax Commissioners* [1917] 1 KB 486 at p. 504 CA). If there was suppression, the order may be set aside without regard to the merits (*Boyce v. Gill* [1891] 64 LT 824). In other words there must be full, frank and sufficient disclosure otherwise the application will, in the absence of special circumstances, be dismissed. Now, having perused through the affidavits and the exhibits enclosed and exhibited therein, I found that there was no full and frank disclosure of the facts of the case as the respondent failed to disclose that:

(a) the petitioner had lawfully terminated or recalled the banking facilities granted to the respondent;

(b) the banking facilities granted to the respondent was repayable on demand;

(c) there was an admission and acknowledgment of debt by the respondent to the petitioner;

(d) the debt was only disputed at a later stage; and

(e) the court may order winding-up even if the respondent has admitted only part of the debt.

I will now elaborate further.

(a) The petitioner had lawfully terminated or recalled the banking facilities granted to the respondent

The respondent was very cunning because it intended to create a charge over all its assets in favour of PAMB thereby changing the circumstances under which the petitioner had first granted the banking facilities to the respondent. It was agreed between the parties that since the respondent was a public listed company, all banking facilities for working capital and trade lines granted to the respondent, at that material time, would be on a clear basis and that all the respondent's financiers ranked *pari passu* (see para. 11 of encl. 19 at p. 4) and this was never denied by the respondent. Even though the petitioner's consent was not needed before the respondent create the charge, yet one of the glaring terms of the banking facilities extended to the respondent by the petitioner was that the petitioner's obligations to continue to make available to the respondent the banking facilities was subject to there being no change in circumstances which may affect the ability of the petitioner to grant the loan. This was never challenged at all by the respondent and this was a

material fact that the respondent should have disclosed to the court at the hearing of the *ex parte* application, yet there was no such disclosure. It was suppression of the facts to the detriment of the petitioner.

(b) The banking facilities granted to the respondent was repayable on demand

The banking facilities granted to the respondent were repayable on demand and there was no tenure given for repayment of the loan. Using this as a leverage, the petitioner had on 19 September 1997 written to the respondent conveying the message that the petitioner "would like to terminate" the banking facilities given and demanded that the respondent make payment on or before 30 September 1997. In the *Encyclopaedia of Banking Law*, Butterworths issue of 1996 at p. C 68, the learned authors had this to say:

> A bank overdraft facility or loan is repayable on demand unless the terms and circumstances of the contract of lending show that, as a matter of necessity to give business efficacy to the contract, a term must be implied requiring the bank to give notice over a reasonable period of time before the right of repayment arises. The court's approach in law to any agreement for a bank overdraft facility or loan, in the absence of any express agreement providing for the duration of the overdraft facility or loan, or for the date of repayment is, to consider whether, according to the ordinary rules for implication of terms into commercial contracts, any term controlling the duration of the facility or the date of repayment is to be implied. If no such term must be implied, money lent under the overdraft facility or loan is no more than money lent and is therefore repayable on demand. Mere knowledge in the bank that a customer intends to spend all or part of the money in a business venture, which will take a long period of time to come to fruition, cannot by itself give rise to an implied term requiring a period of notice of repayment calculated by reference to the probable duration of that business venture.

and applying these passages to the context of the present case, the petitioner in fact demanded that the respondent pay the full amount of the banking facilities of RM9.6 million, as the exact figure due and owing on 30 September 1997 was not the final amount due and owing to the petitioner as the respondent was still using the banking facilities up to 31 October 1997. Of course, if the respondent had paid the petitioner, the excess would have been refunded to the respondent. The redemption statement was duly given. The petitioner's demand for the respondent to settle the amount claimed within one and half months (from 19 September 1997 to 31 October 1997) was certainly reasonable in the circumstances as the respondent was granted a syndicated credit facilities by PAMB which would have been available for utilisation by 15 October 1997 and could have been used to repay the petitioner. On 3 October 1997, the respondent wrote to the petitioner in these words:

> We refer to your letters of withdrawal of facilities dated 19 September 1997 addressed to Red Box (Malaysia) Berhad, Victory Packaging Industries Sdn Bhd, Bestjoh Sdn Bhd and H. Mark Sdn Bhd; and the letter to Red Box Overseas Pte Ltd dated 23 September 1997.
>
> As the amounts due to you will be repaid from the syndicated credit facilities managed by Perwira Affin Merchant Bank Bhd, we would like to inform you that the facilities will be available for utilisation by 15 October 1997.
>
> We hope you will understand and accept the above slight delay in settlement of the amounts due to you.

and by the tenor of this letter, it was clear beyond per adventure that the respondent intimated that the debts due to the petitioner will be repaid in due course. In *Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76 SC, the court held that the bank was in breach of its contract when it treated the term loan as an on demand loan and recalled it prematurely. Since the right of the bank to recall the loan had not accrued, the customer was held to be entitled to damages. In that case, the duration of the loan was for a period of four years, and Edgar Joseph Jr SCJ writing a separate judgment cited the following passage that appeared in *Paget's Law of Banking* (10th edn) at p. 183 (see p. 94 of the report):

> In short, where a banker agrees to lend for a specific period, that agreement cannot, unless there is a breach by the borrower, be terminated by the bank purely on the strength of its alleged right to repayment on demand or on the strength of such a right given in its standard security document.

In the present case, the banking facilities that were extended to the respondent did not have any tenure or duration of time stipulated therein and it was repayable on demand. In *Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Ors (supra)*, the facility letter contained the following words:

> For your information, all facilities granted by us are subject to periodical review and repayable on demand although we do not at this time anticipate exercising our rights in this respect.

and Edgar Joseph Jr SCJ was of the view that the borrower in that case was entitled to some reasonable time to repay. His Lordship then continued to say as follows (see p. 95 to p. 96 of the report):

> In this context, I am reminded of what Linden J said in the Canadian case of *Broadloom Cpn [1968] Ltd v. Bank of Montreal et al* [1979] 25 OR (2d) 198 which was an action for damages for failure of a creditor to give reasonable time for repayment of an on demand loan. Linden J. recognized that the bank

concerned was obliged to give the debtor some reasonable time to repay the loan even though the loan was a demand loan. He went on to hold that in assessing what length of time was reasonable in a particular fact situation various factors must be analyzed, namely:

(1) the amount of the loan;

(2) the risk to the creditor of losing his money or the security;

(3) the length of the relationship between the creditor and the debtor;

(4) the character and reputation of the debtor;

(5) the potential ability of the debtor to raise the money required in a short period;

(6) the circumstances surrounding the demand for payment; and

(7) any other relevant factors.

and using these passages as leverages, it was argued on behalf of the respondent that the petitioner was wrong in terminating the banking facilities prematurely because, so it was said, that the petitioner was not entitled to terminate the banking facilities simpliciter. But the respondent failed to highlight and emphasise two crucial points: that the Supreme Court in *Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Ors (supra)* held that although the bank was in breach of the contract by recalling the overdraft facilities prematurely yet the bank was entitled to recover the loan disbursed to the borrower. In my judgment, the petitioner in the present case was not wrong following the tenor of the judgment of the Supreme Court in *Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Ors (supra)* in recalling or terminating the banking facilities in the manner and style which they had adopted because the loan was repayable on demand.

I will now endeavour to consider the relevant factors in deciding what would constitute "reasonable time to repay" in the context of the present case:

(i) The amount of the loan and the risk of the creditor of losing his money or the security

It must be recalled that the petitioner granted banking facilities to the respondent which were repayable on demand and the amount was RM9.6 million. That amount was given on a clean basis. The amount was indeed colossal and the risk on the part of the petitioner of losing that money was great. It was for these reasons that the petitioner proceeded with the winding-up petition.

(ii) The length of the relationship between the creditor and the debtor and the character and reputation of the debtor

For fear of repetition it must be recalled that the respondent was a long standing customer of the petitioner. Their dealings commenced in 1998. Although the respondent agreed to pay the petitioner the amount claimed from the syndicated loan facilities yet the respondent failed to do so. To add insult to injury, the respondent also failed to show that it would pay the petitioner the sum of RM9.6 million. The reputation of the respondent was indeed at the lowest level and it was unthinkable that the respondent could simply refuse to repay the banking facilities extended by the petitioner.

(iii) The potential ability of the debtor to raise the money required in a short period

The fact that the respondent, as a debtor, had the syndicated credit facilities to repay the petitioner which would have been available for utilisation by 15 October 1997 as stated in the respondent's letter dated 3 October 1997 as seen in exh. 'B' of encl. 19 at p. 43 clearly showed that the respondent as a debtor was in a position to raise the money required within a short span of time. The respondent had the ability to pay all their bankers who had withdrawn credit facilities because of the charges created in favour of PAMB (see exh. "G" of encl. 19 at p. 57). To me, the fact that the respondent did not pay the petitioner but instead had paid many of its other creditors would give rise to an inference of *mala fide*. The banking facilities extended to the respondent were more in the nature of money lent and it was therefore repayable on demand.

(iv) The circumstances surrounding the demand for payment

As I said the respondent was granted syndicated credit facilities led by PAMB. The respondent's assets were charged in favour of the syndicated financiers. Since all the securities were given to other financiers, the petitioner lost priority and became an unsecured creditor. Earlier on, the scenario was far better: no priority was given to any financier because all the facilities were granted on a clean basis and all the financiers ranked *pari passu*. All these averments can be seen in paras. 11, 12 and 13 of encl. 19.

(c) There was an admission and acknowledgment of debt by the respondent to the petitioner

In the *ex parte* application the respondent failed to disclose this fact to the court. The respondent had by letters dated 25 November 1997, 27 March 1998 and 3 March 1998 admitted the debt due and owing to the petitioner (see exhs.

"F", "I" and "K" of encl. 19 at pp. 53, 67 and 82 thereof). In my judgment, this material fact should have been brought to the attention of the court.

It is interesting to refer, once again, to the case of *Anglian Sales Ltd v. South Pacific Manufacturing Co Ltd (supra)* that was alluded to in the early part of this judgment. That was a case where the appellant debtor company did not dispute the debt. The appellant debtor company accepted the fact that it owed the respondent a substantial part of the amount claimed and the court held that in the circumstances the respondent creditor was entitled to present its petition. The appellant debtor company had a cross-claim or counterclaim which equalled or exceeded the true amount of the appellant's indebtedness to the respondent creditor, yet the Court of Appeal ruled that the respondent creditor was entitled to prosecute its petition. McMullin J delivering a separate judgment had this to say at p. 252 of the report:

> It follows that where the existence of the debt on which the petition is founded is unchallenged it cannot be said with the same confidence that the proceedings amount to an abuse of process merely by reason of an alleged counterclaim. Where therefore the debtor, while admitting the debt, advances a counterclaim in attempted answer to a petition, the latter should normally proceed to determination, with the Court retaining a discretion as to whether it ultimately makes a winding up order or not.
>
> For these reasons we think that Roper J ought not to have stayed the proceedings. It follows that South Pacific is entitled to succeed on its cross-appeal and proceed with its petition. We would therefore dismiss the appeal, allow the cross-appeal and revoke the stay of the petition.

In the same vein, Greig J had this to say as seen at p. 255 of the report:

> This is not a case in which the petitioner's debt is disputed or in which it can be said that the petition must fail. The respondent is a creditor in what is conceded to be a substantial amount. The appellant has a cross-claim sounding in unliquidated damages. That may leave it in doubt as to whether the respondent on the hearing of the petition will necessarily succeed but it cannot be predicated now that the petition is bound to fail. The petitioner, the respondent in this case, ought to be entitled to prosecute its petition.

All things being equal, it must be borne in mind that on the hearing of the petition it remains a matter of discretion as to whether the winding-up court would grant the petition or reject it (*Re LHF Wools Ltd* [1969] 3 All ER 882).

The company in *Re Tweeds Garages Ltd* [1962] 1 All ER 121 was heavily indebted to the petitioners and the existence of that indebtedness was never in dispute. Only the exact amount of the indebtedness was disputed. Plowman J ordered the company to be wound-up.

In *Pioneer Concrete (M) Sdn Bhd v. Celini Corp Sdn Bhd* [1999] 5 CLJ 145 at p. 149, I had this to say:

> In my judgment, the debt incurred by the respondent to the tune of RM462,819.50 was not in dispute at all. Inability to pay debts under s. 218(1)(e) of the Companies Act 1965 is a common ground for a winding-up order. It is a correct statement of the law to say and I so say that *prima facie*, the petitioner as a creditor who is not paid has a right to file a petition for winding-up, whatever the motives may be. The court is not concerned about the motives of the petitioner here in winding-up the respondent (Morgan Guaranty Trust Co of *New York v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95). It is germane to mention that the test of commercial insolvency is simple. It is this. Whether the company is unable to meet its current debts as they fall due? A company may have substantial wealth which cannot be realized immediately and if that happens the company is said to be unable to pay its debts within the purview and ambit of s. 218(1)(e) of the Companies Act 1965 and this is so even though on liquidation the company will be able to meet all its liabilities: *Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v. Official Receiver and Liquidator of Mosbert Acceptance Ltd* [1978] 1 MLJ 57; *Wei Giap Construction Co (Pte) Ltd v. Intraco Ltd* [1979] 2 MLJ 4; *Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd* [1980] 2 MLJ 53; *Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21; *MBf Finance Bhd v. Sri Hartamas Development Sdn Bhd* [1992] 1 CLJ 160 at p 169; *Lian Keow Sdn Bhd (in liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 at p 454 and *PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd* [1995] 1 MLJ 21 at p 29.

(d) The debt was only disputed at a later stage

As demonstrated the respondent never denied nor disputed the debt from 19 September 1997 to 8 June 1998. It was only when the respondent served the notice of motion on the petitioner on 8 June 1998 that the respondent disputed the debt. A similar situation also arose in *Mageleine Investments Pte Ltd v. Swiss Levingston (Property Consultants) Pte Ltd* [1990] 1 CLJ 385; [1990] 1 MLJ 470. In that case correspondences between the parties showed that the plaintiff did not deny that there was any commission due and payable to the defendant. It was only later that the plaintiff denied liability. The court ruled in favour of the defendant creditor.

(e) The court may order winding-up even if the respondent has admitted only part of the debt

The classic precedent often resorted to would be the case of *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 SC In that case, the appellant had served a notice on the respondent company

demanding payment of a sum of $127,159 and notifying that action for the winding-up of the respondent company would be taken in the event that payment was not made within the stated time. The sum was for the cost of bricks supplied. No payment was made and the appellant filed a petition for winding-up. The respondent company then applied for an injunction to restrain the appellant from advertising the petition and this was granted by the High Court. The appellant being dissatisfied lodged an appeal. It appeared that the respondent company disputed the appellant's claim but admitted that it owed the appellant a sum of $60,580. In allowing the appeal, Wan Hamzah SCJ (as he then was) speaking for the Supreme Court had this to say (see p. 448 to p. 449 of the report):

> Although in the letter "J" referred to by the learned judge the respondent company disputed the appellant's claim for $127,159, in its affidavits in support of its application for injunction the respondent company admitted that it owed the appellant a sum of $60,580 and stated that it was at all times ready and willing to pay this sum. In our judgment, as the debt of $60,580 is not disputed the respondent company is caught under section 218(2)(a) as having neglected to pay it and is deemed to be unable to pay its debt. The amount of the admitted and unpaid debt is substantial, and it was almost half of the amount claimed by the appellant. Therefore the appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding up or not to order it. If an order of winding up is made, the respondent company can still defend on the balance amount in dispute. Under the Act, the liquidator may defend any action or other legal proceedings in the name and on behalf of the company which has been ordered to be wound up. The Act also provides for the fixing of dates on which creditors are to prove their debts or claims against the company. Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adducted to enable it to consider whether or not there was a *bona fide* dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

Further down the same page of the same judgment, his Lordship Wan Hamzah SCJ (as he then was) continued in serious vein:

> The only other ground of the respondent company to support its application for an injunction is to be found in its effort to show that it is solvent. It produced the balance sheet, the trading, contract, profit and loss account, a list of debtors and the amounts of their debts, and a list of creditors and the amounts due from them. All of these documents show the positions as at 30 November 1986 and on the basis of these documents it was contended that the balance after the amount of debts owing to the respondent company is

> reduced by the debts owed by it was $451,690.15 in favour of the respondent company. In our judgment this matter, if relevant at all, is a matter properly to be considered at the hearing of the petition, and it is premature to consider it at this stage. The Companies (Winding Up) Rules 1972 require that every petition shall be advertised, and in our opinion it is immaterial whether the effect of such advertisement in a particular case would result in damage being caused to the company proposed for winding up. If the advertisement would in fact cause such damage, this is not a ground to prevent a *bona fide* petitioner from advertising.

and it would be apparent that part admission of a debt by the respondent company in that case attracted the provisions of s. 218(2)(a) of the Companies Act 1965 in that the respondent company was considered to have neglected to pay the debt and, consequently, deemed to be unable to pay its debt. In the present case, the scenario was no better. The respondent, in the present case, admitted the whole of the debt claimed and this court must allow the petitioner to pursue its petition without hindrance so as to enable this court to consider all the evidence and determine, once and for all, whether it should exercise its discretion to order winding up or otherwise. No amount of damage that may flow from advertising the petition would prevent this court from ordering the advertising to be carried out by the petitioner.

An admission of a particular fact may either be express or implied. In whatever form it takes, the admission must be clear and unequivocal (*Ellis v. Allen* [1914] 1 Ch 904, 909; *Ash v. Hutchinson & Co. (Publishers)* [1936] Ch 489, 503; and *Technistudy v. Kelland* [1976] 1 WLR 1042 [1976] 3 All ER 632 C.A.). Thus, if a defendant admits a document but does not admit its full contents, the plaintiff may still succeed by obtaining judgment if the document, on production, clearly establishes and supports the plaintiff 's claim (*Barnard v. Wieland* [1882] 30 WR 947; *Rutter v. Tregent* [1879] 12 Ch.D. 758; and *Smith v. Davies* [1884] 28 Ch D 650). There was clear admission on the part of the respondent to the whole debt and the petitioner must not be restrained from advertising the petition. This was my judgment and I so hold accordingly. Lest I be accused of an oversight, the judgment of that brilliant judge - Hashim Yeop A Sani CJ (Malaya) (as he then was) in *Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 should be put to the fore. In that case, that brilliant judge held that *prima facie* a creditor is entitled to petition for a winding-up against a company which fails to pay its debt. His Lordship further held that the creditor should not be prevented from pursuing its petition so that the court would be able to consider all the evidence and determine whether it should exercise its discretion to order a winding-up or not.

The documentary evidence in the present case was so overwhelming that no court of law in this country would allow encl. 14. The respondent's letters exhibited in encl. 19 would certainly nail the respondent to its coffin, so to speak. The letters in encl. 19 marked as:

(1) exh. "F" at p. 53 dated 25 November 1997,

(2) exh. "I" at p. 67 dated 27 March 1998, and

(3) exh. "K" at p. 82 dated 3 March 1998

tell harrowing tales. These letters were admissions or acknowledgments of the debts by the respondents. In exh. "K" at p. 82 of encl. 19, the respondent admitted in strong language as follows:

> We would like to confirm that the amount outstanding owing to Maybank as at 31 January 1998 is RM8,445,946.40.

In exh. "I" at p. 67 of encl. 19, the admission went like this:

> A total sum of approximately RM13.0 million is owing to Maybank, of which RM8.2 million is due from Red Box (Malaysia) Berhad and RM4.5 million is due from Red Box Overseas Pte Ltd.

Finally, in exh. "F" at p. 53 of encl. 19, the respondent acknowledged the debt of approximately RM8.2 million and this was what the respondent said:

> We recognise the amounts which are owing to you by the Group. We sincerely request for a reasonable time to raise the funds to repay you.

An argument was advanced to the effect that the three letters of admission should be excluded as evidence because it was said that those letters were privileged and were written "without prejudice" in the course of negotiation between the parties. Now, in deciding whether the three letters of admission were admissible in law or otherwise, the court must have sight of those letters and decide accordingly. This was the approach adopted by Vaughan Williams J in the case of *In re Daintrey, Ex Parte Holt* [1893] 2 QB 116. That was a case where the appellant, the petitioning creditor, presented a bankruptcy petition against the respondent alleging as the act of bankruptcy that the respondent had given him notice that he had suspended, or was about to suspend the payment of his debts. The document relied upon to prove that act of bankruptcy was a letter dated 24 December 1892, sent by the respondent to the petitioning creditor headed "without prejudice", and in that letter the respondent offered to compound for the debt due from him to the petitioning creditor and the respondent also stated that he was unable to pay his debts and would suspend payment unless the composition was accepted. On 15 December 1892, the appellant commenced an action against the respondent

to recover a sum of money. The bankruptcy petition was presented on 17 January 1893 and the judgment was signed in the action on 24 January 1893. Upon the hearing of the petition, the petitioning creditor relied solely upon the notice which had been sent to him by the respondent debtor. The latter objected and argued that that letter was written with a "without prejudice" label and was not admissible in evidence. The registrar decided in favour of the respondent debtor and ruled that the letter was not admissible and dismissed the petition for want of proof of the act of bankruptcy as alleged. The petitioning creditor – the appellant, lodged an appeal. The court (Vaughan Williams and Bruce JJ) allowed the appeal. His Lordship Vaughan Williams J writing for the court said at p. 119 to p. 120:

> We think that the document was admissible in evidence. In the first place we think that the Court was entitled to look at the document and its contents for the purpose of deciding the question of its admissibility. It seems to us that the question of its admissibility depended upon a matter of fact, which matter of fact it was the function of the registrar, in his character of judge and not in his character as a juryman, to decide, and it seems to us that the judge, for this purpose, was entitled to look at the document, though not in evidence, just as he would have been entitled to have looked at the document if he had been trying a case before a jury before allowing it to be put in evidence before the jury. In our opinion the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which alone the rule applies, exist.
>
> The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer the rule has no application. It seems to us that the judge must be entitled to look at the document to determine whether the document does contain an offer of terms. Moreover, we think that the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed. It may be that the words "without prejudice" are intended to mean without prejudice to the writer if the offer is rejected; but, in our opinion, the writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer, and for this reason also we think the judge is entitled to look at the document to determine its character. The next question which arises is the question whether this document is of a character fulfilling the conditions to which the rule of exclusion applies. This is the document: - [The learned judge then read the letter.]
>
> It seems to us that some of the conditions are complied with, but not all. There was a dispute, for there was an action pending between the parties. There was an offer, *ie*, the offer of a composition, which was intended to apply, amongst

> other things, to the petitioner's claim in the action; but the document, the letter of the debtor to the petitioner, was, in our opinion, more than this: it was a clear act of bankruptcy, and it was notice to the petitioner of such act of bankruptcy, and it seems to us that a notice of an act of bankruptcy cannot be given "without prejudice" because the document in question was one which, from its character, might prejudicially affect the recipient whether or not he accepted the terms offered thereby. For the reasons already given we think that such a document does not fall within the rule which excludes offers for peace written without prejudice, and ought to have been admitted in evidence. If admitted, it conclusively proves the act of bankruptcy. It follows that the learned registrar ought to have made the receiving order on the petition, and we now make it and allow this appeal.

It is germane to consider some authorities where the courts have decided that certain documents were privileged only when there was a dispute and where the parties were genuinely negotiating to settle such a dispute. For a start, I shall refer to the case of *Rush & Tompkins Ltd v. Greater London Council and another* [1988] 3 All ER 737 HL, where Lord Griffiths speaking for the House of Lords (Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Griffiths, Lord Oliver of Aylmerton and Lord Goff of Chieveley) said at p. 739 to p. 740 of the report:

> The 'without prejudice rule' is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in *Cutts v. Head* [1984] 1 All ER 597 at 605-606, [1984] Ch 290 at 306:
>
> > That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed (by) Clauson J in *Scott Paper Co v Drayton Paper Works Ltd* [1927] 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.
>
> The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make

clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent on the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase 'without prejudice'. I believe that the question has to be looked at more broadly and resolved by balancing two different public interests, namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation.

Nearly all the cases in which the scope of the without prejudice rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances no question of discovery arises because the parties are well aware of what passed between them in the negotiations. These cases show that the rule is not absolute and resort may be had to the without prejudice material for a variety of reasons when the justice of the case requires it. It is unnecessary to make any deep examination of these authorities to resolve the present appeal but they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. Thus the without prejudice material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement, which is the point that Lindley LJ was making in *Walker v. Wilsher* [1889] 23 QBD 335 at 337 and which was applied in *Tomlin v. Standard Telephones and Cables Ltd* [1969] 3 All ER 201, [1969] 1 WLR 1378. The court will not permit the phrase to be used to exclude an act of bankruptcy (see *Re Daintrey, ex p Holt* [1893] 2 QB 116, [1891-4] All ER Rep 209), or to suppress a threat if an offer is not accepted (see *Kitcat v. Sharp* [1882] 48 LT 64). In certain circumstances the without prejudice correspondence may be looked at to determine a question of costs after judgment has been given: see *Cutts v. Head* [1984] 1 All ER 597, [1984] Ch 290. There is also authority for the proposition that the admission of an 'independent fact' in no way connected with the merits of the case is admissible even if made in the course of negotiations for a settlement. Thus an admission that a document was in the handwriting of one of the parties was received in evidence in *Waldridge v. Kennison* [1794] 1 Esp 143, 170 ER 306. I regard this as an exceptional case and it should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence.

Lord Griffiths rounded up his judgment by saying at p. 744 of the report:

> In my view, this advantage does not outweigh the damage that would be done to the conduct of settlement negotiations if solicitors thought that what was said and written between them would become common currency available to all other parties to the litigation. In my view, the general public policy that applies to protect genuine negotiations from being admissible in evidence should also be extended to protect those negotiations from being discoverable to third parties. Accordingly, I would allow this appeal and restore the decision of the official referee.

This would be followed by the case of *Norwich Union Life Insurance Society v. Tony Waller Ltd* [1984] E G (Estates Gazette) 42, where Mr. Justice Harman wrote in fine style at p. 42 thereof, the following:

> That letter was followed, some eight months or so later, by a letter of August 4 1982. Like the first, this is somewhat inapt. I will refer to the whole of it, since a great deal of argument has turned upon it. It gives the young lady in Messrs Edward Erdman's reference at the top, and dates it "August 4 1982", and marks it "PRIVATE & CONFIDENTIAL RECORDED DELIVERY", and addresses it to "T Waller Esq, Messrs Tony Waller Shoes" – not, it is to be noted, to the tenant by its proper title at all – gives the address, and then puts the words
>
> *Without Prejudice.*
>
> Dear Sir, 19 *Fawkon Walk, Hoddesdon.*
>
> We have been instructed by your landlords, the Norwich Union Insurance Group to negotiate with you in connection with the rent review contained in your lease which becomes operative as at September 29 1982.
>
> It is our client's proposal to increase the rental to 11,500 pounds per annum exclusive as from this date.
>
> We trust that this increase is acceptable to you and would be obliged if when replying you would enclose the name and address of the solicitors who will be acting on your behalf.
>
> Yours faithfully.

What is anyone to make of that document? It is headed "Without prejudice", and any lawyer meeting a letter like that at once starts back and says "I cannot look at this", because it is claimed to be privileged. I have been urged to look at it, although privilege is claimed for it, in order to determine whether the label "Without prejudice" can appropriately be attached to it. If it is appropriately attached to it, then the letter is inadmissible and cannot be referred to in any matters proceeding between these two parties.

At p. 43 of the report, Mr. Justice Harman continued in serious vein: *a*

> The rule is, as Mr. Wood, in my view, absolutely correctly submitted, a rule of public policy based upon the proposition that it is better to settle than to fight - I paraphrase Mr. Wood, but I think that is not unfair as a way of putting what he was submitting. It is, in my judgment, an accurate description of the purpose of the rule, and it also, in my judgment, illuminates the occasions on *b* which the rule arises, and they are entirely in accordance with Vaughan Williams J's formulation. The rule has no application unless some persons is in dispute or negotiation with another. Here, the letter of August 4 1982 was written, not quite out of the blue, because there had been that rather inept inspection letter written eight months earlier, but written at a time when there was, so far as anything before me goes, no view, position, attitude or anything *c* else emanating from or evidenced by the tenant. The matter at that stage was, in my view, entirely an opening shot, and an opening shot in a situation where no war had been declared and no dispute had arisen. Indeed "shot" may be an inapt word to apply to it. As it seems to me, this letter was not written in the course of negotiation, which must imply that each side has expressed a *d* view and that a modus vivendi between them is being proposed, nor had a dispute been constituted, whether by litigation, arbitration or mere verbal or oral threats over the back fence of two neighbouring properties. It seems to me beyond any question that this rubric "Without prejudice" can only be effectively used where one has an extant disagreement – dispute, issue, call it what you will – or extant negotiations with both sides having set up their own *e* position in them. As it seems to me, this letter, being the initiating letter, could not appropriately be so headed, and I therefore hold against Mr. Wood's first argument. In my view it is not governed by the rubric attached to it "Without prejudice", which words remain part of it and are material as part of its writing for the purpose of understanding what it really says but which do not have the effect of validly claiming privilege. *f*

and in so deciding Mr. Justice Harman vigorously applied the decision of Vaughan Williams J in *In re Daintrey, Ex Parte Holt (supra)*, a decision of the Queen's Bench Division in a bankruptcy case where the court had to consider the legal implications of documents marked "without prejudice". *g*

In *Wong Nget Thau & Anor v. Tay Choo Foo* [1994] 4 CLJ 617; [1994] 3 MLJ 723, the court there decided that the fact that a document was headed "without prejudice" did not conclusively or automatically render it privileged from admission in evidence in any subsequent proceedings. In deciding whether a letter marked "without prejudice" was admissible, the court must consider *h* whether the letter was part of a genuine attempt to settle a dispute. As no dispute existed at the time when the letter was written, it could not be said to have been written in an attempt to settle a dispute or in the course of negotiation, and was therefore admissible.

i

In *Oh Kuang Liang v. Associated Wood Ind Sdn Bhd* [1995] 2 CLJ 961; [1995] 2 AMR 1872, I had occasion to consider the issue of "without prejudice" letters and there I said at p. 1877 to p. 1878 of the report, the following:

> It appears therefore that the "without prejudice rule" is a rule governing the conduct of the trial in particular controlling the admissibility of evidence and is founded on the time honoured public policy of encouraging litigants to settle their differences rather than litigate them in a court of law. Court battles are to be avoided if the parties could settle their differences amicably.
>
> I am of the considered view that the "without prejudice rule" applies generally to exclude all negotiations genuinely aimed at settlements, whether oral or in writing, from being given in evidence. A prudent and competent solicitor will always be on guard and will always label any negotiating correspondence with the words "without prejudice" – to make known and to make clear beyond doubt that in the event the negotiations fell through, they are not to be referred to at the subsequent trial. I think the correct approach to resolve the "without prejudice rule" would be by balancing two different public interests, namely, the public interest in promoting settlements, on the one hand, and the public interest in full discovery between parties to litigation, on the other.
>
> I have done some research and I have discovered that nearly all the cases where the scope of the "without prejudice rule" has been considered concern the admissibility of evidence at trial after negotiations have failed. It is quite obvious that in these situations no question of discovery arises because the parties are well aware of what had transpired between them in the negotiations. It is not incorrect to say that the underlying purpose of the "without prejudice rule" is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. Lindley LJ, held in *Walker v. Wilsher* [1889] 23 QBD 335 at 337, that the without prejudice material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement and this point seems to have been applied in *Tomlin (supra)*. I must at once sound a warning that *Walker v. Wilsher (supra)* is not an authority for the proposition that if the negotiations succeed and a settlement is concluded the privilege is thrown to the wind, having served its purpose. On a proper reading of *Walker v. Wilsher* I would have thought that there it was held that it was not permissible to receive the contents of a without prejudice offer on the question of costs and no question arose as to the admissibility of admissions made in the negotiations in any possible subsequent proceedings. *Cutts v. Head (supra)* propounds the principle that in certain circumstances the without prejudice correspondence may be looked at to determine a question of costs after judgment has been given. In *Re Daintrey, ex p Holt* [1893] 2 QB 116; (1891-4) All ER Rep 209, the court refused to allow the "without prejudice rule" to exclude an act of bankruptcy and in *Kitcat v. Sharp* [1882] 48 LT 64, the court too refused to be bound by the "without prejudice rule" when its purpose was to suppress a threat if an offer is not

accepted. I am of the view that the exceptions referred to in these cases should not and must not be allowed to whittle down the protection given to all parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails, the maker should not be held accountable and the admission of the facts made for the purpose of the compromise should not be received in evidence. I am not prepared, to borrow the words of Ormrod J, in *Tomlin (supra)* to lift the umbrella of "without prejudice" for the applicant. Rain or shine, that umbrella should remain. I am fortified in my view by passages appearing in the judgment of Chang Min Tat FJ, in *Malayan Banking Bhd v. Foo See Moi* [1981] 2 MLJ 17 FC, to the effect that:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

With respect, had *Malayan Banking Bhd v. Foo See Moi (supra)*, been brought to the attention of the learned judge in *Aluminium Industries Sdn Bhd v. Cookermate (M) Sdn Bhd (supra)*, the decision arrived at might be different.

For the foregoing reasons, in my discretion, I strike out the whole of para 7 together with exh. "C" of encl. 6, with an agreed costs of RM200 to the respondent payable by the applicant.

Incidentally, *Oh Kuang Liang v. Associated Wood Ind. Sdn Bhd* was also reported in another popular law journal – the Current Law Journal, *vide* [1995] 2 CLJ 961.

I pause here momentarily and take stock of the situation.

It would be apparent that the respondent's three letters of admission were made and sent to the petitioner before there was any dispute in respect of the respondent's indebtedness to the petitioner for the following reasons:

(1) the contents of the three letters of admission together with the redemption statement clearly showed the manifest intention of both parties to settle the respondent's indebtedness to the petitioner by using the funds provided to the respondent by the syndicated credit facilities managed by PAMB;

(2) the three letters of admission were sent before the respondent alleged that there was wrongful termination of banking facilities by the petitioner; and

(3) the three letters of admission were sent before the petitioner served the first notice dated 26 December 1997 under s. 218(2)(a) of the Companies Act 1965 to the respondent for the latter to pay the debts that were due and outstanding to the petitioner (see exh. "SSKI" of encl. 10).

It was also apparent that the three letters of admission were not made in a genuine attempt to settle any dispute and I venture to advance three main reasons for this situation:

(a) although the petitioner had provided the respondent with the redemption statement as expressly requested by the respondent's second letter of admission for the purpose of paying the petitioner from the syndicated credit facilities managed by PAMB, yet the respondent had not paid the petitioner at all from that financial source;

(b) the respondent did not offer any reasonable explanation or excuse for failing to pay the petitioner from the syndicated credit facilities managed by PAMB; and

(c) there was no evidence at all to justify or even excuse the respondent's failure to pay the petitioner from the syndicated credit facilities managed by PAMB.

It would be germane to mention that the respondent's three letters of admission were not marked "without prejudice" and thus it would be correct to say that those letters were not privileged at all. The three letters of admission were also not marked "Private and Confidential".

Of pertinence would be the following factual scenario. The petitioner expressly averred and relied on the respondent's first and second letters of admission in paras. 13 and 14 at pp. 4 to 5 of the affidavit in encl. 19 that was affirmed on behalf of the petitioner. The respondent in encl. 26 did not expressly deny the averments made by the petitioner in encl. 19 particularly in regard to paras. 13 and 14 at pp. 4 to 5 of encl. 19. In encl. 30, the respondent too did not deny those averments. The failure to answer material averments would be fatal to the respondent as the respondent must be taken to have admitted them (*Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529; [1996] 3 MLJ 533; *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 at p. 385; *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281; *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 3 MLJ 332; and *Abdul Razak bin Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339; [1995] 2 AMR 1174, [1995] 2 MLJ 287).

Section 64 of the Evidence Act 1950 enacts that documents must be proved by primary evidence. This is entirely based on the best evidence rule. Section 62 of the Evidence Act 1950 enacts that primary evidence must necessarily mean the document itself produced for the inspection of the court. Edgar Joseph Jr J (as his Lordship then was and who rose as a senior Federal Court Judge) in *Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, 368, aptly said:

> It is a firmly established rule (to which there are exceptions) requiring that when documentary evidence is tendered, primary evidence of the document, that is to say the production of the document itself is essential (see section 64 of the Evidence Act).
>
> The exceptions to the rule are also well established and specifically provided for (see section 65(1) of the Evidence Act).

Here, there was a blatant failure on the part of the respondent to disclose to the court at the hearing of the *ex parte* application in encl. 13 to the effect that the respondent had in fact admitted and acknowledged the debt that was due to the petitioner. There was thus an absence of a full and frank disclosure at that *ex parte* hearing.

The Second Issue: Whether The Petitioner Was Acting Mala Fide When Filing The Winding-up Petition With The Intention Of Putting Pressure On The Respondent To Accede To The Petitioner's Demand?

It must be recalled that the petitioner had served the petition on 13 April 1998. It was simply a case of the respondent calling and requesting the petitioner not to advertise the petition. The petitioner was magnanimous and agreed; this was based on one telephone call. In that telephone call the respondent had proposed a settlement. These facts have been agreed by the parties and it clearly showed the *bona fide* conduct on the part of the petitioner (see pp. 3 and 7 of paras. 8 and 18 of encl. 19). In the midst of the negotiation to settle the debt, the respondent filed a notice of motion on 9 May 1998 seeking to restrain the petitioner from advertising the petition (see encl. 19 of p. 3 at para. 8) notwithstanding the fact that the petitioner had earlier on, to be precise in April 1998, consented to the cancellation of the advertisement without any court order – an act reflective of the petitioner's *bona fide*. The respondent should have first given notice to the petitioner of their intention to file the notice of motion or, at the very least, the respondent should have waited for negotiations to fail before proceeding with the injunction. The lack of communication between the parties rested entirely on the respondent and this was reflective of the *mala fide* on the part of the respondent.

Another fact situation to consider would be this. The respondent had earlier on in October 1997 informed the petitioner of the respondent's willingness to settle the banking facilities in that arrangements were made to settle and repay the petitioner through the syndicated credit facilities (see p. 43 of encl. 19 in exh. "B"). The respondent had even informed the petitioner that the syndicated facilities would be available for utilisation by 15 October 1997, but alas no payment was made. Even though there was no time frame given to the respondent to settle the debt, yet the petitioner had acted in a *bona fide* manner by giving the respondent time – from September 1997 till February 1998. On 12 December 1997, the petitioner asked the respondent for a time frame for repayment but the respondent did not respond. The sum total of these salient facts would be this: that the petitioner had acted *bona fide* and when filing the winding-up petition the petitioner did not exert pressure on the respondent to accede to the petitioner's demand (*Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd (supra)* at p. 449 B to E). It was wrong to say that the petitioner had applied pressure on the respondent when the respondent had, in the first place, admitted the whole of the debt and was desirous of repaying them through the syndicated facilities.

The available evidence showed that the petitioner had acted *bona fide* from the time the banking facilities were granted to the respondent until the present time. When the negotiations fell through, the petitioner informed the respondent of its intention to proceed with the winding-up proceedings on 3 June 1998 (see the averment at para. 17 of encl. 24 at p. 4) and this was confirmed in writing on 4 June 1998. The respondent never intended to repay the banking facilities and they merely put a false front and made empty promises which they never kept. For instance, the respondent did not revert to the petitioner by 2 June 1998 in regard to the terms of the settlement even though the respondent made that promise. The respondent too had agreed to repay the petitioner the sum of RM250,000 beginning on 1 June 1998 but the respondent also failed to fulfil that promise.

There was hardly any reason for the respondent to proceed with the notice of motion in encl. 14 on an *ex parte* basis bearing in mind that the petitioner had solicitors and the respondent knew that the petitioner's solicitors had in the past cooperated fully by withdrawing the advertisements of the winding-up petition in April 1998. It is trite law that *ex parte* injunctions are reserved for cases of real urgency where there has been a true impossibility of giving a notice of motion. In *Castle Fitness Consultancy Pte Ltd v. Manz (supra)*, Coomaraswamy J said at p. 144 of the report:

Hence, if on an ex parte application, the plaintiff does not make full and sufficient disclosure, his application will, in the absence of special circumstances, be dismissed. This is a rule based on public policy. It is designed to prevent abuse of the procedure of court by a person who has a special advantage in view of the absence of the other party.

The court should deal with great strictness and severity with persons who apply for ex parte injunctions. A party applying is bound to put the court in possession of all the facts in order to enable it to judge whether the defendant ought to be put to what may be described as a very serious sanction, ie a temporary injunction.

This was a case where the respondent obtained an *ex parte* injunction without informing the petitioner of the notice of motion. There was *mala fide* as the respondent failed to make known certain facts to the court. In short, there was a complete failure to make full and frank disclosure of the facts to this court when this court granted the *ex parte* order to the respondent on 8 June 1998.

Third Issue: Was There A Substantial Dispute Of The Debts?

As alluded to earlier, the respondent admitted the debts on 25 November 1997, 3 March 1998 and 27 March 1998 (exhs. "F", "K" and "I" respectively of encl. 19). The petition was served on the respondent on 13 April 1998 and there was still no dispute as to the debt. But when the respondent filed and served the notice of motion on 8 June 1998 restraining the petitioner from advertising or proceeding further with the winding-up proceedings, the respondent showed its true colour by disputing the debt. Calculation wise the dispute as to the debts arose some two months after the winding-up petition was filed and some six months after the banking facilities were terminated. It was an exercise in procrastination when the respondent disputed the debt. To be precise, it was an after thought on the part of the respondent when it challenged the debt that was due and it was akin to the case of *Mageleine Investments Pte Ltd v. Swiss Levingston (Property Consultants) Pte Ltd (supra).*

Fourth Issue: Was The Respondent Able To Pay Its Debts And Had Not Failed To Do So By Virtue Of The Respondent's Failure To Comply With The Notice Under s. 218(2)(a) Of The Companies Act 1965?

From the audited accounts of the respondent from 1996 to 1998, it was apparent that the respondent had incurred losses (see encl. 10, p. 91 of exh. "SSK 4" and encl. 28, p. 11 of exh. "R"). The respondent's audited accounts and their projections for the year 1999 right up to the year 2002 showed that the respondent was unable to pay its debts and will continue to incur losses (see encl. 19, exh. "N"). I will now go into some detail. In 1995, the respondent suffered pre-tax losses of RM969,000. In 1996, the respondent

suffered further pre-tax losses of RM6,666,000 and in 1997, the pre-tax losses came up to RM7,991,000 (see encl. 19, para. 30 at p. 12 and exh. "N" at p. 95 thereof). For 1997 right to 31 January 1998, the excerpts from the audited accounts for the year ending 31 January 1998 showed that the respondent was not performing well at all. It was a dismal performance. The turnover sales of the respondent was RM6 million while the gross loss incurred by the respondent came up to RM2.5 million. For every album the respondent's make, the respondent would lose 40 cents on the basis of the following calculation:

RM2.5 million divide by RM6 million equals 0.41.

To be a viable company, the respondent should be making a gross profit. The reason would be simple: gross profit and gross loss figures do not take into account administrative costs. Now, since the gross loss was RM2.5 million, the nett loss (after deducting administrative costs and expenses) would be much more. Thus, the more the respondent sell, the more would the respondent lose. The turnover of the respondent has been reducing from RM7.4 million in 1997 to RM6.0 million in 1998. This meant the sales were actually reducing.

From the respondent's statement of account especially the profit and loss account, it showed that the respondent had a nett profit of RM5.4 million, but this was as a result of an unrealised foreign exchange gain. The respondent too admitted that this profit was a result of the unrealised foreign exchange gain. That being the case, it was total falsehood when the respondent said that they were making profits. Of pertinence would be the fact that in eight (8) months after the banking facilities were terminated, not a cent has been paid by the respondent to the petitioner. The failure to pay must by necessary inference be due to the losses incurred by the respondent.

In my judgment, the respondent was financially weak and was in no position to pay its debts. Being financially weak, the respondent had failed to comply with the s. 218 notice that was given by the petitioner. The statutory notice under s. 218(2)(a) of the Companies Act 1965 must relate to a specified debt and that debt cannot be seriously questioned (*Re A Co* [1985] BCLC 37). That debt must also be presently due (*Re Bryant Investment Co. Ltd* [1974] 2 All ER 683) and liquidated (*Ng Ah Kway v. Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 252). The debtor has exactly twenty one (21) clear days to pay (excluding the day of service) (*Re Lympne Investments Ltd* [1972] 2 All ER 385). In the event the debtor fails to pay within twenty one (21) days of service of the notice, the creditor is entitled under the law to present a petition and the creditor cannot be restrained by way of an injunction. It is not open to the debtor to openly say that it is able to pay but chooses not to pay (*Cornhill*

Insurance plc v. Improvement Services Ltd [1986] 1 WLR 114). The debtor has no choice but to pay. Once the debtor fails to pay as demanded, it is presumed that the debtor is unable to pay its debt, a presumption which is rebuttable. The onus is on the debtor to show to the court that it is able to pay its debts (*PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd* [1998] 4 CLJ Supp 437; [1995] 1 MLJ 21, 29). Inability to pay by the debtor would mean that the court is empowered with the jurisdiction to make a winding-up order (*Securicor (M) Sdn. Bhd. v. Universal Cars Sdn. Bhd.* [1985] 1 MLJ 84). All these general principles of law when applied to the respondent would severely cripple the respondent in its notice of motion in encl. 14.

The truth of the matter was that the respondent was "buying time" when they filed encl. 14. The available evidence favoured the petitioner and the respondent must, in the circumstances, let justice take its own course. For the reasons adumbrated above, the notice of motion in encl. 14 must be dismissed forthwith. Costs should rightly go to the petitioner.